Supreme Court, U.S.
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No. 01-1553

IN THE

Supreme Court of the United States

STATE OF OHIO,

v. *Petitioner,*

MATTHEW REINER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

REPLY BRIEF

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Petitioner, the State of Ohio, respectfully submits this Reply to the Brief in Opposition filed by Respondent, Matthew Reiner. Petitioner files this brief under Rule 15.6 of the Rules of this Court.

REASONS TO GRANT THE WRIT

In his Brief in Opposition, Respondent claims that the Ohio Supreme Court's ruling rests solely on an adequate and independent state ground and that the constitutional issues raised by Petitioner were not properly raised below. Finally, Respondent argues that the State of Ohio is the sole and final arbiter of standing. Respondent errs on all of these points.

I. THE DECISION OF THE SUPREME COURT OF OHIO RAISES FEDERAL QUESTIONS THAT INVOKE THE JURISDICTION OF THIS COURT.

In *State v. Reiner,* 93 Ohio St.3d 601, 757 N.E.2d 1143 (2001), *Reiner II*, the Supreme Court of Ohio found that the government's grant of immunity to its witness was not appropriate. Respondent would have this Court conclude that that was all that the Ohio court found. But even a cursory reading of *Reiner II* shows that the Supreme Court of Ohio did much more than merely apply state law to find that a grant of immunity was not appropriate in this particular case.[1]

First, the Supreme Court of Ohio created a prophylactic rule that grants of immunity are never proper in an "either/or" situation, that is, when either the defendant

[1] The text of the Ohio immunity statute can be found in the Petition for Writ of Certiorari. (Appendix 23-24).

or the witness sought to be immunized might be guilty of the offense. *Id.*, at Ohio St. 3d 605, N.E.2d 1146. That holding effectively expanded the Fifth Amendment in an "either/or" situation and created a "super-privilege" that could never be overcome by a grant of immunity. The result is a disturbance of the delicate balance that has historically existed between a witness's right to assert the privilege against self-incrimination and the government's legitimate interest in obtaining needed testimony through grants of immunity. It is the ramifications of its decision on the Fifth Amendment and on the ability of the government to grant immunity, which itself is part of the "constitutional fabric,"[2] that presents one of the federal questions suitable for review by this Court.

The Supreme Court of Ohio went even further in its opinion, however. Its own precedent held that neither the State of Ohio nor the defense could call a witness to the stand for the express purpose of having that person assert a Fifth Amendment right to silence in front of the jury.[3] In *Reiner II*, however, after first holding that the witness could not be compelled to testify, the Supreme Court of Ohio stated: "The jury should have been permitted to hear Batt take the Fifth Amendment and to evaluate her testimony on that basis." 93 Ohio St.3d at 605, 757 N.E.2d at 1146. This holding deprives the government of the process it is due when engaged in a criminal prosecution. Thus, this holding raises a question of constitutional dimension that alone invokes the jurisdiction of this Court.

[2] *Kastigar v. United States*, 406 U.S. 441, 447 (1972); *Ullmann v. United States*, 350 U.S. 422, 438 (1956).

[3] See *State v. Kirk*, 72 Ohio St. 3d 564, 566-569, 651 N.E.2d 981, and paragraph one of the syllabus (1995); *State v. Dinsio*, 176 Ohio St. 460, 465-468, 200 N.E.2d 467, 470-472 and syllabus (1964).

In his Brief in Opposition, Respondent fails to address these two main concerns. Petitioner agrees with Respondent that Ohio's immunity statute is unique in that it requires judicial review of immunity-grant requests, but it is the Ohio Supreme Court's flawed application of this power that invokes this Court's jurisdiction. Even though state courts have the right to interpret state law freely, they do not have the power to affect adversely federal constitutional rights in the process. Respondent's reasoning would permit any state court to offend the United States Constitution and federal law with impunity, so long as it did so in the course of interpreting and applying a state statute.

Moreover, Respondent's assertion that the decision below rested solely on an interpretation and application of state law is belied by the Ohio Supreme Court's historical reliance on the United States Constitution and federal concepts in this area of the law. The Ohio Supreme Court in *State v. Sinito,* 43 Ohio St. 2d 98, 99, 330 N.E.2d 896, 897 (1975), endorsed the concept that Ohio's immunity statute is part of the "constitutional fabric," just as is the federal immunity statute, 18 U.S.C. § 6003. In so doing, *Sinito,* in a practice apparently anathema to Respondent, relied on law from other state and federal jurisdictions and invoked the Fifth Amendment of the United States Constitution as well as its Ohio counterpart, Article I § 10. (Appendix 1-2). Thus, the Ohio Supreme Court was, and continues to be, influenced by the United States Constitution and law from other state and federal courts when it broaches the issue of an immunity grant after a Fifth Amendment

privilege has been asserted.[4]

The Ohio Supreme Court has also adopted the rule accepted in both federal and state courts that the executive, not the judiciary, should be the arbiter of when and to whom immunity should be granted.[5] Nevertheless, in a stunning about-face, the Ohio Supreme Court in *Reiner II,* for reasons known only to it, has gone against the vast weight of its own precedent, as well as the established rule of law in other jurisdictions. This, in turn, led the Ohio court to effectively amend the Fifth Amendment by creating a "super-privilege" in "either/or" cases and to impermissibly prejudice the government by holding that a criminal defendant should be permitted to call a recalcitrant witness to the stand for the sole purpose of invoking a Fifth Amendment right.

This Court is familiar with the applicable considerations when viewing assertions of adequate and independent state grounds:

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[4] In addition, the Ohio Supreme Court in *State v. Conrad*, 50 Ohio St. 3d 1, 4, 552 N.E.2d 214, 217 (1990) has equated the immunity under Ohio's statute governing testimony in front of the legislature with that of 18 U.S.C. § 6002.

[5] In *State ex rel. Leis v. Outcalt,* 1 Ohio St. 3d 147, 149, 438 N.E.2d 443, 446 (1982), the Ohio Supreme Court ruled: "The present statute, however, clearly reflects the intent of the General Assembly that immunity be used only as a prosecutorial tool to fulfill the government's need for testimony." The Ohio Supreme Court has even determined that an appellate tribunal should not insert itself into the immunity process. *State ex rel. Koren v. Grogan*, 68 Ohio St. 3d 590, 594, 629 N.E.2d 446, 450 (1994). As the Ohio court stated: "It would be incongruous to conclude, in light of the plain language of R.C. 2945.44, that a grant of immunity pursuant to R.C. 2945.44 by one court is operative only at the discretion of some other court. The statute directs otherwise . . . ." *Id.*

> In *Michigan v. Long,* 463 U.S. 1032, 77 L. Ed. 2d 1201, 103 S. Ct. 3469 (1983), we adopted a standard for determining whether a state-court decision rested upon an adequate and independent state ground. When "a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so." *Id.,* at 1040-1041.

Arizona v. Evans, 514 U.S. 1, 7 (1995).

Under this standard, the Ohio Supreme Court's decision in *Reiner II* is disposed for review by this Court because it rests on federal law concepts and its ramifications affect the Fifth Amendment of the United States Constitution. Even though state courts may freely interpret state law, they cannot adversely affect federal constitutional rights in the process. Here, the Ohio Supreme Court misinterpreted and abrogated federal rights founded in the Fifth Amendment of the United States Constitution. The Ohio Supreme Court ignored the dictates of immunity law by stating that immunity cannot be granted when the witness in question, rather than the defendant, might be culpable of the crime. It also acted improperly when it prospectively forced a witness claiming a Fifth Amendment privilege to assert the privilege in front of the jury.

Reiner II cannot dodge review merely because the Supreme Court of Ohio did not expressly invoke the United States Constitution or rely on federal law in its

decision. Try as it might, a state supreme court cannot evade this Court's jurisdiction by avoiding any express citation to applicable federal rights while engaging them implicitly. Instead,

> where the non-federal ground is so interwoven with the other as not to be an independent matter, or is not of sufficient breadth to sustain the judgment without any decision of the other our jurisdiction is plain. And this is true also where the non-federal ground is so certainly unfounded that it properly may be regarded as essentially arbitrary or a mere device to prevent a review of the decision upon the federal question.

Enterprise Irrigation District v. Farmers Mutual Canal Company, 243 U.S. 157, 164 (1917) (citations omitted).

Moreover, as stated in *Arizona v. Evans, supra,* at 8-9: "State courts, in appropriate cases, are not merely free to — they are bound to — interpret the United States Constitution. In doing so, they are *not* free from the final authority of this Court." (emphasis in original) Thus, when the Ohio Supreme Court made its decision in *Reiner II*, it was duty bound to follow the dictates of the Fifth Amendment of the United States Constitution, as well as the decisions of this Court, even if those sources were not mentioned by name in its opinion. Yet the Ohio Supreme Court has neglected this Court's mandate to apply the United States Constitution when it is germane to the case. It has also neglected the principle that an interpretation of state law may not offend the Federal Constitution. These errors should not inure to the benefit of Respondent.

II. CONSTITUTIONAL ISSUES ARE PROPELY BEFORE THIS COURT FOR ITS REVIEW.

Respondent contends that Petitioner's constitutional claims in general, and its separation of powers argument in particular, were not timely and properly raised below. Respondent's consternation is misplaced.[6] The procedural history of this case demonstrates that Petitioner has raised the constitutional issues at the first opportunity. In *State v. Reiner*, 89 Ohio St. 3d 342, 352-356, 731 N.E.2d 662, 673-676 (2000), *Reiner I*, Respondent argued that the grant of immunity was improper only because the witness did not have a valid Fifth Amendment privilege to assert. The Supreme Court of Ohio agreed; this Court did not.[7]

On remand, Petitioner stated "to reconstrue the validity of the trial court's grant of immunity, such consideration could only turn on a theory not previously advanced by Reiner, not previously addressed by the State, and not embodied in [the Ohio Supreme] Court's original holding." (Appendix 6). In response, the Supreme Court of Ohio merely ordered additional briefing on the following issue: "What effect, if any, does the judgment of the Supreme Court of the United States have on this Court's holding that 'the grant of immunity was unlawful?'." (Appendix 9).

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[6] Additionally, two points are worthy of note. First, Petitioner's contention that the Respondent lacked standing to challenge the grant of immunity to the State's witness was raised in the Ohio Supreme Court, *Reiner II, supra*, at Ohio St. 3d 607, N.E.2d 1148 fn1 (Cook, J., dissenting). Second, the prohibition against this Court considering issues not raised below is not absolute. *Glover v. United States*, 531 U.S. 198, 205 (2001).

[7] *Ohio v. Reiner*, 532 U.S. 17, 18, 20-21 (2001).

After briefing on this general issue, the Supreme Court of Ohio held that the grant of immunity to the State's witness was unlawful because it did not further the administration of justice. That conclusion, though frustrating, was not especially surprising. What was surprising was the rationale offered by the Ohio court for its conclusion. Instead of finding that the trial court had abused its discretion under the particular facts of this case, the Supreme Court of Ohio handcuffed the government in numerous criminal cases by holding that grants of immunity are never proper in so-called "either/or" situations. Equally surprising was the court's rejection of its own precedent to conclude that the witness "taking the Fifth" could be called by the defense for the sole purpose of invoking the privilege in front of the jury.

Until the Supreme Court of Ohio issued its opinion in *Reiner II*, Petitioner had no reason to anticipate that the state court would offend the Fifth Amendment and restrict the correlative governmental tool of granting immunity in the way that it did or for the reasons that it did. Indeed, Petitioner was not prescient enough to anticipate that the same court which in *Reiner I* had held that the government's witness possessed no Fifth Amendment privilege because she claimed her innocence would conclude in *Reiner II* that this same witness could not be granted immunity because she might be guilty.

Therefore, Petitioner filed a motion for reconsideration and argued that *Reiner II* impermissibly infringed on the scope of the government's use of immunity as a tool in criminal prosecutions. (Appendix 18-22). Petitioner also contended that the court had been incorrect in pronouncing that the defense should be allowed to call the witness asserting the privilege for the sole

purpose of invoking the privilege in the presence of the jury. (Appendix 29-30). Petitioner repeated these arguments in its Petition.

Petitioner has raised the constitutional issues challenging the Ohio decision as soon as possible. The constitutional problems inherent in the Ohio decision were created by the Supreme Court of Ohio when it issued its opinion following remand from this Court. Therefore, the issues raised by Petitioner are properly before this Court for review.

III. STANDING IS AN ISSUE THAT THIS COURT COULD ADDRESS IF THE WRIT FOR CERTIORARI IS GRANTED.

Finally, Respondent argues that standing is purely a matter of state law. He is only partially correct. Although state courts and legislatures are free to establish their own rules of standing, these powers end when federal constitutional rights are affected. As Justice Oliver Wendell Holmes Jr. stated in *Davis v. Wechsler,* 263 U.S. 22, 24-25 (1923) (citations omitted):

> The state courts may deal with that as they think proper in local matters but they cannot treat it as defeating a plain assertion of federal right. The principle is general and necessary. If the Constitution and laws of the United States are to be enforced, this Court cannot accept as final the decision of the state tribunal as to what are the facts alleged to give rise to the right or to bar the assertion of it even upon local grounds.

The present case contains the "plain assertion of federal right" of which Justice Holmes spoke. See also, *Love*

v. Griffith, 266 U.S. 32, 33 (1924). The government's witness asserted her Fifth Amendment privilege against self-incrimination. According to every court that has decided the issue, including the Ohio Supreme Court [see *State v. Coleman*, 75 Ohio St.3d 454, 455, 663 N.E.2d 924, 925 (1996)], a criminal defendant simply lacks standing to challenge the subsequent, and correlative, grant of immunity to a witness. Similarly, a criminal defendant should not be afforded the opportunity to defeat a governmental grant of immunity merely by claiming that the witness seeking immunity is the culpable party. Yet this is a consequence of the decision of the Ohio Supreme Court. Similarly, a criminal defendant should not be permitted to benefit impermissibly from a witness's decision to invoke the Fifth Amendment privilege. Yet this, too, is a consequence of the Ohio Supreme Court's holding that a criminal defendant should be allowed to call a reluctant witness to the stand for the sole purpose of invoking the privilege in the presence of the jury.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,
Julia R. Bates, Prosecuting Attorney
Lucas County, Ohio

J. Christopher Anderson
Counsel of Record
Assistant Prosecuting Attorney
Counsel for Petitioner

APPENDIX

OH Const Art. I § 10 (Anderson 2002)

§ 10 Trial of accused persons and their rights; depositions by state and comment on failure of accused to testify in criminal cases.

Except in cases of impeachment, cases arising in the army and navy, or in the militia when in actual service in time of war or public danger, and cases involving offenses for which the penalty provided is less than imprisonment in the penitentiary, no person shall be held to answer for a capital, or otherwise infamous, crime, unless on presentment or indictment of a grand jury; and the number of persons necessary to constitute such grand jury and the number thereof necessary to concur in finding such indictment shall be determined by law. In any trial, in any court, the party accused shall be allowed to appear and defend in person and with counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witnesses face to face, and to have compulsory process to procure the attendance of witnesses in his behalf, and a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed; but provision may be made by law for the taking of the deposition by the accused or by the state, to be used for or against the accused, of any witness whose attendance can not be had at the trial, always securing to the accused means and the opportunity to be present in person and with counsel at the taking of such deposition, and to examine the witness face to face as fully and in the same manner as if in court. No person shall be compelled, in any criminal case, to be a witness against himself; but his failure to testify may be considered by the

court and jury and may be made the subject of comment by counsel. No person shall be twice put in jeopardy for the same offense.

IN THE SUPREME COURT OF OHIO

STATE OF OHIO	*	S.C. No. 99-239
	*	
Plaintiff-Appellant,	*	On Remand from
	*	the Supreme
	*	Court of the
-vs-	*	United States,
	*	Case No. 00-1028
	*	
MATTHEW REINER	*	
	*	
Defendant-Appellee.	*	

MOTION FOR PROCEDURAL CLARIFICATION FOLLOWING REMAND FROM SUPREME COURT OF THE UNITED STATES

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In its decision of March 19, 2001, the Supreme Court of the United States remanded this case to this Court for further proceedings not inconsistent with its opinion, but it expressly declined to address the question whether immunity was appropriate. See *Ohio v. Reiner* (2001), ——— U.S. ———, 69 U.S.L.W. 3616.

No procedural rules of this Court appear to address the future course of proceedings or opportunity for the parties to be heard subsequent to such remand. However, Rule 14, Section 4(A) of this Court provides for motion practice in connection with pending matters. Pursuant thereto, the State of Ohio hereby moves for clarification of the procedural posture of this action in the form of notice to the parties of those issues construed by the court to arise from the remand, and/or an opportunity to be heard orally or in writing as appropriate, and/or for such other or further relief as this Court deems just and proper under the unique circumstances for the reasons noted in the Memorandum below.

MEMORANDUM IN SUPPORT

Appellee/Cross-Appellant Reiner (hereinafter referred to as "Reiner"), in his Proposition of Law No. 1 in his brief in support of cross-appeal before this Court, challenged the grant of immunity to Susan Batt by the trial court on one ground and one ground only — that the witness lacked a valid Fifth Amendment claim. While Reiner challenged the contentions of Appellant (hereinafter referred to as "the State") that he lacked standing to be heard on the request for immunity (Reiner's brief, pgs. 1-3) and that he waived any such objection thereto (Reiner's brief, pgs. 3-5), a close reading of his arguments, especially at pages 5-7 of his brief, reveals that he articulated no other theory whatsoever to support his claim of wrongfulness in the grant of immunity.

This Court, in its opinion, recognized that Reiner challenged the immunity grant "because Susan Batt did not have a valid Fifth Amendment privilege." *State v. Reiner* (2000), 89 Ohio St.3d 342, 352. The Court overruled the State's contention that Reiner failed to preserve error by properly objecting to the grant of immunity. *Id.* at 356. But a careful reading of this Court's opinion reflects that it sustained Reiner's Fifth Amendment argument and neither addressed nor articulated any other theory of claimed deficiency in the grant of immunity. Additionally, this Court overruled the State's argument that Reiner lacked standing to challenge immunity solely on the basis of the absence of a Fifth Amendment privilege. As the Court put it:

> The State argues that a defendant lacks standing to challenge a grant of immunity (citations omitted). This argument assumes that the grant of immunity met the statutory threshold of a valid privilege against self-incrimination. Because Susan Batt lacked a valid Fifth Amendment privi-

lege against self-incrimination and the grant of immunity was unlawful, the State's standing argument lacks merit. *Id.*

As such, and in light of the judgment of the Supreme Court of the United States, if this Court is inclined on remand to reconstrue the validity of the trial court's grant of immunity, such consideration could only turn on a theory not previously advanced by Reiner, not previously addressed by the State, and not embodied in this Court's original holding. Additionally, such a revisitation of the immunity issue must analyze, *de novo,* the State's standing argument with the perspective of the United States Supreme Court's opinion that Susan Batt did, as a matter of law, properly invoke a Fifth Amendment privilege.

CONCLUSION

For the above reasons, the State moves for such relief as this Court deems appropriate, including but not limited to:

1) Notice from this Court to both parties of the issue or issues that this Court now believes critical to the resolution of such matters, if any, remaining unresolved upon remand from the Supreme Court of the United States; and/or

2) An opportunity for both parties to file further briefs pursuant to the remand; and/or

3) An opportunity for further oral argument if any reframed issues compel a conclusion that the focus of any previously unresolved, unwaived, matters are of critical importance to the

development of the law; and/or

4) Such other and further relief as this Court deems just and proper.

Respectfully submitted,

JULIA R. BATES,
PROSECUTING ATTORNEY
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Assistant Prosecuting Attorney

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Assistant Prosecuting Attorney

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PROOF OF SERVICE

I hereby certify that a copy of this Motion For Procedural Clarification Following Remand From Supreme Court Of The United States was sent by ordinary U.S. Mail to Co-Counsel for Appellee, Samuel Z. Kaplan, Kaplan & Lipson, 835 Spitzer Building, 520 Madison Avenue, Toledo, Ohio 43604; Fritz Byers, 824 Spitzer Building, Toledo, Ohio 43604; and Robert Z. Kaplan, 830 Spitzer Building, Toledo, Ohio 43604, on

this 25th day of April, 2001.

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STATE OF OHIO

THE SUPREME COURT OF OHIO

Filed May 23, 2001

State of Ohio, Appellant/Cross Appellee,	:	Case No. 99-239
v.	:	
Matthew Reiner, Appellee/Cross-Appellant.	:	ENTRY

Upon consideration of appellant/cross-appellee's motion for procedural clarification following remand from the Supreme Court of the United States and appellee/cross-appellant's motion to set briefing schedule and oral argument,

IT IS ORDERED by the Court that the motion to set briefing schedule be, and hereby is, granted, and the motion for oral argument be, and hereby is, denied.

IT IS FURTHER ORDERED by the Court that the parties shall brief the following issue:

> What effect, if any, does the judgment of the Supreme Court of the United States have on this Court's holding that "the grant of immunity was unlawful"?

IT IS FURTHER ORDERED by the Court that the cross-appellant shall file an appellant's brief within 40

days from the date of this entry; the cross-appellee shall file an appellee's brief within 30 days after the filing of the cross-appellant's brief; the cross-appellant shall file a reply brief, if any, within 20 days after the filing of the cross-appellee's brief; and the parties shall otherwise proceed in accordance with S. Ct. Prac. R. VI.
(Lucas County Court of Appeals: No. L971002)

/s/
THOMAS J. MOYER
Chief Justice

0014r052301

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	*	Supreme Court Case
	*	Nos: 99-239 & 99-427
	*	
Appellant/	*	On Appeal
Cross-Appellee,	*	from the
	*	Lucas County
	*	Court of Appeals,
-vs-	*	Sixth Appellate
	*	District
	*	
MATTHEW REINER,	*	Upon remand
	*	from the
	*	United States
	*	Supreme Court
Appellee/	*	
Cross-Appellant.	*	Court of Appeals
	*	Case No: L-97-1002

APPELLANT / CROSS-APPELLEE'S MOTION FOR RECONSIDERATION
AND MEMORANDUM IN SUPPORT

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MOTION

Appellant/Cross-Appellee State of Ohio, by and through counsel, hereby moves this Honorable Court, pursuant to S. Ct. Prac. R. XI, for reconsideration of the Court's decision on the merits in this case, rendered November 28, 2001, and reported at 93 Ohio St.3d 601. Specifically, this Court is urged to reconsider its holding that the trial court's grant of immunity from prosecution for witness Susan Batt "severely prejudiced the rights of the defendant and did not further the administration of justice." 93 Ohio St.3d at 605. The reasons why this

motion should be granted, and why this Court should reconsider its decision and find that the trial court's grant of immunity did not constitute reversible error, are explained fully in the memorandum below, which is incorporated into this motion as if fully rewritten herein.

Respectfully submitted,

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John J. Weglian, #0020674
Assistant Prosecuting Attorney

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MEMORANDUM IN SUPPORT

Introduction

This case arose out of events that occurred on August 28, 1995. On that day, Alex, the infant son of the Appellee/Cross-Appellant, was in the care of babysitter Susan Batt until Deborah Reiner returned home from work. Susan Batt left the Reiner residence between 5:30 and 6:00 p.m. Later, Deborah Reiner's parents visited until Matthew Reiner arrived home at 7:30 p.m. Deborah and Matthew Reiner put Alex to bed at approximately 10:30 p.m. Later, after hearing Alex whimpering, Matthew Reiner took the child downstairs. Within a half hour, Alex's breathing became labored and he became unresponsive. After awakening his wife, Matthew Reiner called 9-1-1. By the time that emergency personnel arrived, Alex had no pulse and was not breathing. Although initially put on a respirator at the hospital, Alex was removed from life support two days later and died.

Matthew Reiner was subsequently charged with involuntary manslaughter. All of the persons with Alex on the day of his death were possibly responsible for the child's death, including Susan Batt, Deborah Reiner, Alex's grandparents, and Matthew Reiner. The Office of the Lucas County Prosecutor prosecuted Matthew Reiner based on the opinion of the Lucas County coroner that Alex had died from "shaken baby syndrome," his opinion that the shaking had occurred shortly before the onset of Alex's respiratory arrest when Alex had been alone with Matthew Reiner, and the experience of the prosecutor's office with other cases of shaken baby syndrome which suggested a short time period between the injury to infants and their respiratory arrest.

At trial, the State adduced the testimony of the Lucas County coroner that Alex had died of shaken baby syndrome. Specifically, the coroner opined that Alex had died as the result of axonal shearing, an injury that would cause respiratory arrest within a short period of time. This expert opinion was buttressed by the testimony of two additional board certified pathologists. On the other hand, defense experts hypothesized that Alex had died from an edema rather than axonal shearing. Death by edema would have lengthened the time period between the injury to Alex and his respiratory arrest so that someone other than Matthew Reiner, specifically Susan Batt, could have been responsible for the shaking and the subsequent death of the child.

Susan Batt was subpoenaed by both the prosecution and the defense. Upon the advice of counsel, she asserted her Fifth Amendment right against self-incrimination and refused to testify. Following a hearing, the trial court granted immunity from prosecution to Susan Batt pursuant to R.C. 2945.44. Matthew Reiner was subsequently convicted of involuntary manslaughter and sentence to five years probation.

Matthew Reiner appealed his conviction to the Sixth District Court of Appeals, and the conviction was reversed on grounds of juror misconduct. *State v. Reiner* (Dec. 18, 1998), Lucas App. No. L-97-1002, unreported. This Court subsequently found the reversal by the Court of Appeals improper as to juror misconduct.

This Court upheld the reversal of the judgment of conviction, however, on the ground that the trial court had improperly granted immunity to Susan Batt. According to this Court, Susan Batt did not have a valid Fifth Amendment privilege to assert because she consis-

tently denied all culpability. *State v. Reiner* (2000), 89 Ohio St.3d 342. On March 19, 2001, the Supreme Court of the United States, noting that the Fifth Amendment protects the innoent and guilty alike, reversed this Court. *Ohio v. Reiner* (2001), 532 U.S. ___, 121 S.Ct. 1252, 149 L.Ed.2d 158.

On remand from the U.S. Supreme Court, this Court has now decided that although Susan Batt had a valid right against self-incrimination to assert, the trial court erred when it granted immunity to Batt pursuant to R.C. 2945.44. According to this Court, the trial court erred because the grant of immunity did not further the administration of justice. Also according to this Court, the trial court's error resulted in prejudice to Matthew Reiner severe enough to warrant reversal of his conviction. It is to this latest decision of this Court that the State objects.

Argument [1]

The majority of this Court did not analyze the evi-

[1] Because a motion for reconsideration should not be a reargument of the case, S.Ct.. Prac. R. XI, § 2(A), the State has attempted to confine its argument here to objections to this Court's decision of November 28, 2001. The State in no way waives or recants any of the arguments that it has heretofore made in urging this Court to affirm the trial court's grant of immunity to Susan Batt. In particular, the State continues to insist that Matthew Reiner lacks standing to challenge either Batt's assertion of a Fifth Amendment right or the trial court's grant of immunity. In addition to the cases previously cited by the State and those authorities appearing in the footnote of the dissenting opinion in this case, the Court's attention is directed to *State v. Wolery* (1976), 46 Ohio St.2d 316, 319, where this Court stated: "Whether the purported grant of immunity to witnesses Stroebel and Johnston will effectively shield those individuals from a future prosecution based upon their testimony in appellant's trial is of no concern to the appellant. The Fifth Amendment privilege against self-incrimination is personal to each witness. *Hale v. Henkel* (1906), 201 U.S. 43." (footnote omitted)

dence presented to the trial court or the rationale of the trial court when it granted statutory immunity to Susan Batt. If it had done so, the deferential standard of review ("abuse of discretion") would have counseled for upholding the trial court's grant of immunity. Instead, the majority reached its conclusion that the trial court erred by adopting a bright-line, prophylactic rule that states that grants of immunity under R.C. 2945.44 are inappropriate in an "either/or" situation. The crux of the Court's decision lies in the pronouncement: "[I]mmunity is not appropriate in the either/or situation; it could actually hinder the search for truth." 93 Ohio St.3d at 605.

As explained more fully below, this holding is faulty for a variety of reasons. The ruling inappropriately interferes with the broad discretion traditionally afforded to prosecutors concerning whom to charge with crimes and how to best prosecute the likely offenders. Risk/reward analysis counsels for permitting, not prohibiting, grants of immunity in "either/or" situations. Even if the rule that immunity is inappropriate in an "either/or" situation is valid, it has been adopted by the Court without guidance to lower courts for its implementation. At any rate, even if the trial court erred in granting immunity to Susan Batt, the error was harmless.

Finally, on an unrelated matter, the Court's decision also improperly suggests that a witness who asserts a Fifth Amendment privilege can be called to the stand during trial for the purpose of asserting that privilege in front of a jury.

1. *The rule announced through this decision inappropriately interferes with prosecutorial discretion.*

As was recognized even in the majority opinion of the Court in this case, "[i]mmunity is a prosecutorial tool utilized to fulfill the government's need for testimony." 93 Ohio St.3d at 604 (citing State ex rel. *Leis v. Outcalt* (1982), 1 Ohio St.3d 147, 149, 438 N.E.2d 443, 446). In the federal system, the prosecutor alone decides to whom use immunity should be granted. A federal trial court's grant of immunity to a witness is a purely ministerial function. See 18 U.S.C. §§ 6003, 6004; see also *United States v. Mohney* (6th Cir. 1991), 949 F.2d 1397, 1401; *United States v. Hooks* (7th Cir. 1988), 848 F.2d 785, 798-799 ("It is the duty of the prosecutor to balance 'the public need for the particular testimony or documentary information in question against the social cost of granting immunity and thereby precluding the possibility of criminally prosecuting an individual who has violated the criminal law.'") (citation omitted); *United States v. Taylor,* 728 F.2d 930, 934 (7th Cir. 1984), cert. denied, 479 U.S. 1056 (1987) ("Both the exclusive nature of Congress's delegation and the fact that the balancing process is wholly within the expertise of the executive branch foreclose the federal courts from taking more than a ministerial role in prosecutorial immunity decisions that are made properly under 18 U.S.C. § 6003."); *In re Daley,* 549 F.2d 469, 478-79 (7th Cir.), cert. denied, 434 U.S. 829 (1977) ("[T]he determination of whether the conferral of immunity is proper in a particular case "requires intimate familiarity with the nature and details of the investigation and the background of the witness." *Murphy v. Waterfront Commission,* 378 U.S. 52, 100, 12 L. Ed. 2d 678, 84 S. Ct. 1594 (1964) (White,

J., concurring). This is knowledge to which the federal prosecutor, and not the federal court, is privy, and it is therefore the authority of the United States Attorney to confer such extensive immunity which must be scrutinized.")

In Ohio, the granting of transactional immunity is governed by statute.

> In any criminal proceeding in this state or in any criminal or civil proceeding brought pursuant to sections 2923.31 to 2923.36 of the Revised Code, if a witness refuses to answer or produce information on the basis of his privilege against self-incrimination, the court of common pleas of the county in which the proceeding is being held, unless it finds that to do so would not further the administration of justice, shall compel the witness to answer or produce the information, if both of the following apply:
>
> (1) The prosecuting attorney of the county in which the proceedings are being held makes a written request to the court of common pleas to order the witness to answer or produce the information, notwithstanding his claim of privilege;
>
> (2) The court of common pleas informs the witness that by answering, or producing the information he will receive immunity under division (B) of this section.

R.C. 2945.44(A). Unlike the federal system, the state trial court does have a role to play in determining that a particular witness should be granted immunity.

The plain language of the statute and its operation make clear, however, that a great deal of deference should be paid to a prosecutor's request for immunity. It is the prosecutor, and the prosecutor alone, who initiates

the granting of immunity by making a written request. After that request is made, the trial court is commanded to grant immunity ("shall compel the witness to answer") "unless it finds that to do so would not further the administration of justice." R.C. 2945.44(A) (emphasis added) In effect, a rebuttable presumption exists that a grant of immunity is proper. That presumption is overcome only if the trial court affirmatively finds that the grant of immunity would not further the administration of justice.

Traditionally, it has been the responsibility of the prosecutor to assess the evidence against suspects. The prosecutor decides whom to prosecute and for what crimes. In making this determination, a prosecutor typically assesses the likely culpability, as well as the relative culpability, of various parties. To facilitate the prosecution of one person, a prosecutor may offer plea agreements or other inducements for the testimony of witnesses.

This Court apparently has no consternation concerning grants of immunity in the "typical" situation. This "typical" situation was described by the Court in the following way:

> The government typically requests that immunity be granted to a witness who is culpable to some extent but whose testimony will also implicate a defendant. Usually the witness's involvement in the situation is of a lesser nature. The government is willing to forgo prosecution of the less culpable witness in order to obtain testimony that is necessary to successfully prosecute the defendant.

93 Ohio St.3d at 604. Thus, in the "typical" situation, this Court is apparently willing to permit the prosecutor

to assess the relative culpability of several potentially culpable persons and obtain grants of immunity to facilitate the prosecution of the person whom the prosecutor believes to be more criminally responsible for the offense.

Yet in the "typical" situation involving multiple offenders (as in any criminal prosecution), the prosecutor may turn out to be wrong. The person granted immunity in the "typical" situation may, in fact, be the greater miscreant. The grant of immunity in the "typical" situation acts to preclude the prosecution of a person believed by the State to be culpable to some extent, and who may be primarily responsible for the offense. Nevertheless, the risk of error in the "typical" situation is borne by the prosecutor.

This Court has failed to explain why the risk of error should not be borne by the prosecutor in the same manner in the "either/or" situation. Otherwise stated, this Court has failed to explain why the distinction between the "typical" situation and the "either/or" situation is anything more than a distinction without a difference.

In an "either/or" situation like the instant case, a prosecutor will have assessed the relative culpability of various persons in light of the evidence and determined that the criminal responsibility of one or more persons is likely to be zero. (In the instant case, based on the physiological mechanism of "shaken baby syndrome" in this case and the temporal proximity of only Matthew Reiner, the prosecutor ruled out other persons, including Susan Batt, as the perpetrator of the offense.) Although the prosecutor might be wrong, the risk of error should be borne by the prosecutor just as it is in the "typical" situation involving a grant of immunity.

The State should be permitted in the "either/or" situation to obtain the testimony of persons whom the prosecutor believes to be free of guilt, but who may be understandably reluctant to testify when the defense is pointing fingers at them. Indeed, if anything, the prosecution should be able to obtain grants of immunity in "either/or" situations more readily than in the "typical" situation. In the "typical" situation, it must be remembered, a grant of immunity will result in the State's inability to prosecute a person whom the government already believes is culpable to some extent. In the "either/or" situation, a grant of immunity will preclude the prosecution of a person whom the State believes is not culpable, but who may be.

A prosecutor should not be penalized in the "either/or" situation for merely doing what prosecutors must do as part of their duties, namely, assessing the evidence and weighing the relative culpabilities of various parties. This Court should not remove the grant of immunity from the prosecutorial toolbox merely because a case falls into an "either/or" category. Instead, just as in the "typical" cases, prosecutors should make the determination of whom to prosecute and should be afforded all of the tools, including grants of immunity, necessary to affect a successful prosecution. In the instant case, by promulgating a bright-line, prophylactic rule that carves out an exception to the grant of statutory immunity, this Court has encroached on the province of the prosecutors and impeded the ability of the State to obtain convictions against persons whom it believes to be responsible for criminal offenses.

2. *Risk/Reward analysis counsels for grants of immunity in "either/or" situations, not a prohibition.*

Following its description of the "typical" grant of immunity situation, the majority opinion attempted to distinguish the instant case.

> Here, the prosecution did not have two potentially culpable persons. Instead, this was an either/or situation. Either Reiner was guilty or Susan Batt was guilty. The government chose to indict Reiner and claimed that there was insufficient evidence to indict Batt. Batt continually claimed her innocence.

93 Ohio St.3d at 605. The opinion then announced the rule that "immunity is not appropriate in the either/or situation." *Id.*

It is unclear from the opinion precisely why this Court concluded that grants of immunity are not appropriate in "either/or" situations. The most likely reason is that the majority was concerned that the person immunized in an "either/or" situation might be the guilty party. After all, in the worst-case scenario involving a grant of immunity in an "either/or" situation, the immunized witness could take the stand, confess to the crime, and remain free from prosecution.

Concerns that an immunized, yet guilty, party might escape the "administration of justice" in an "either/or" situation are not particularly well-founded. First, as has already been noted, prosecutors, as a matter of practice, analyze the evidence surrounding offenses and weigh the relative culpabilities of the potential offenders. There is no reason to believe that most prosecutors are not making their assessments in a competent manner. A

competent analysis by a prosecutor will significantly diminish the risk that immunity will be sought for a person guilty of the crime.

Next, as occurred in the instant case, the immunized witness will often continue to deny culpability even after invoking a Fifth Amendment privilege against self-incrimination. Asserting a Fifth Amendment privilege on the advice of counsel, even in an "either/or" situation, is an insufficient reason to conclude that the witness might be the culpable party. Having already decided not to prosecute the witness, nothing is lost if the witness is immunized from prosecution. Indeed, even if the witness, once immunized, confesses to the crime on the witness stand, nothing has been lost as a result of the immunization, because the State will have already decided not to prosecute the witness prior to seeking immunity.

Finally, even in the worst-case scenario, the administration of justice will still be served, because an innocent defendant will be exonerated. In the instant case, for example, if Susan Batt had taken the stand and confessed to the crime, the case against Matthew Reiner would either have been dismissed or the jury would have returned with a verdict of not guilty. The "administration of justice" is not synonymous with "conviction of the guilty." The administration of justice is furthered when the truth comes out and when one innocent of criminality is not wrongly convicted.

The foregoing demonstrates that the "downside risk" associated with a grant of immunity in an "either/or" situation is minimal. On the other hand, the testimony of the immunized witness might be valuable in a search for the truth. Indeed, the testimony of the immunized wit-

ness could prove valuable to either the prosecution or the defense.

3. *The rule that immunity is not appropriate in an "either/or" situation has been announced in this case without guidance to the lower courts for its application.*

Even if the rule is valid, the majority opinion of this Court in this case does not clarify when an "either/or" situation may be said to exist in order to preclude a grant of immunity. Does an "either/or" situation exist whenever a defendant points an accusatory finger at the witness for whom immunity is sought by the prosecutor, claiming that this someone else, and not the defendant, is actually responsible for the crime? If this is sufficient, then defendants will be in a position to frustrate the use of the prosecutorial tool of immunity by alleging that the putative witness is, or could be, the perpetrator. This would turn on its head the operation of grants of immunity under R.C. 2945.44, including the deference to be accorded to prosecutors and the rebuttable presumption that a grant of immunity is warranted.

If more than a defendant's accusation against a witness is needed to create a bona fide "either/or" situation, then what else is necessary? Does an "either/or" situation that is sufficient to preclude a grant of immunity exist only when the demonstrative evidence and likely testimony of various witnesses at trial raise the possibility that the witness sought to be immunized is the actual perpetrator of the crime? If this is required, then trial courts will be forced to conduct mini-trials whenever a grant of immunity is requested by the State in order to assess the evidence and likely testimony. Such a procedure would inappropriately invade the province of the

prosecutor to determine who should be charged and the province of the jury to weigh the evidence.

4. *The defendant in this case was not prejudiced by the grant of immunity. In addition, any error in the grant of immunity was harmless.*

For the reasons aptly advanced by the dissenting opinion in this case, Matthew Reiner was not prejudiced by the grant of immunity to Susan Batt. In addition, the theory of the case that was presented to the jury by the prosecutor demonstrates that any error in granting immunity to Susan Batt was harmless.

According to the Court of Appeals, "[i]n the present case, the only real issue in dispute is the amount of time elapsed between the trauma inflicted to Alex Reiner and his respiratory arrest."

In his merit brief to this Court, Matthew Reiner posed the issue thusly:

> The central question at trial was how much time elapsed between when Alex had been shaken and when he went into arrest. The State's case hung on proving, by the testimony of Dr. James Patrick, that the act of fatal shaking occurred during a small time-interval when Matthew Reiner was alone with Alex
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> * * *
>
> Alex Reiner indisputably died as a result of "shaken-baby syndrome." He had been shaken so violently that his brain was damaged to the extent of causing respiratory arrest. The State's case against Matthew Reiner was entirely inferential: it depended on the State proving beyond a reasonable doubt that the fatal shaking must have occurred during a small window of time when Matthew

Reiner was alone with his son.

On August 28, Alex and the other Reiner children had been alone with their nanny, Susan Batt, from 7:30 a.m. until 5:30 p.m. Alex was with his mother and grandparents from the time that the nanny left until Matthew Reiner, Alex's father, came home about 7:00 p.m. From then on that evening, Alex was with both of his parents until he was put to bed about 10:15 p.m. There was no dispute that Alex was alone with Matthew Reiner from approximately 10:30 p.m. until about 11:00 p.m. when Alex went into respiratory arrest.

The State hung its case on its ability to prove that the fatal shaking occurred during that thirty-minute interval. To make this proof, in turn, the state attempted (a) to determine the specific neurological mechanism that caused Alex's respiratory arrest, and then (b) to establish how soon after the shaking that specific neurological mechanism would have caused Alex to stop breathing.

The lynch-pin of the State's case against Matthew Reiner was the State's medical hypothesis, advanced by James Patrick, that axonal shearing was the mechanism of respiratory arrest.

Appellee/Cross-Appellant's Combined Brief in Response to Appellant/Cross-Appellee's Brief and Propositions of Law and Argument in Support of Cross-Appeal at 7, 33-34.

This Court has also acknowledged that "[t]he key issue at trial was the timing of the fatal trauma to Alex." 89 Ohio St.3d at 344; see also 93 Ohio St.3d at 603.

The foregoing shows that the jury in this case did not convict Matthew Reiner merely because it might have believed Susan Batt's testimony denying that she had

shaken the infant. On the contrary, in finding Matthew Reiner guilty of involuntary manslaughter, the jury necessarily had to accept as accurate the State's medical evidence and its theory of the neurological mechanism that caused Alex's respiratory failure. The jury also had to reject the defense theory that edema, rather than axonal shearing, was the mechanism of respiratory arrest.

It was the jury's acceptance of the State's scientific evidence, and its rejection the alternative defense theory, that led directly to the conclusion that Matthew Reiner was the perpetrator of the crime. As the defendant candidly admitted in his merit brief to this Court: "If axonal shearing was the mechanism, respiratory arrest would have occurred shortly after the shaking. Matthew Reiner would have to be guilty." Appellee/Cross-Appellant's Combined Brief in Response to Appellant/Cross-Appellee's Brief and Propositions of Law and Argument in Support of Cross-Appeal at 45. In other words, answering the question "What was the mechanism of respiratory arrest?" led inexorably to the answer to the question "Who was responsible for the shaking?"

The trial of this case was essentially a battle between the medical experts. The jury was called upon to assess the merits of the State's theory of the mechanism of respiratory arrest (axonal shearing) and the alternative theory posited by the defense (edema). For a conviction, the jury necessarily had to accept the State's theory and reject the defense's counter-argument. Once the State's theory of the mechanism of respiratory arrest was

accepted by the jury, the conviction of Matthew Reiner was a foregone conclusion.

Given this, it is clear that the jury's acceptance of the testimony of Susan Batt was peripheral. No reasonable jury could have found Matthew Reiner guilty merely because it accepted Susan Batt's testimony that she did not shake Alex. This is especially true because three additional persons, Deborah Reiner and her parents, might have shaken the child and caused the death under the defense theory concerning the mechanism of respiratory arrest.

Therefore, assuming arguendo that the trial court erred when it granted immunity to Susan Batt, any imprimatur thereby placed on the testimony of the babysitter was inconsequential. The jury's verdict in this case did not hinge on an assessment of the credibility of witnesses. The verdict hinged on the jury's assessment of the medical theories propounded by the State and by the defense. Error, if any, in the trial court's grant of immunity to Susan Batt was, therefore, harmless.

5. *The Court should clarify when, if ever, a witness who has been refused immunity may be called to the stand for the sole purpose of invoking the Fifth Amendment right in the presence of a jury.*

The majority opinion ends by stating: "Should the State retry the defendant, Batt may assert her Fifth Amendment right against self-incrimination." 93 Ohio St.3d at 605. The opinion also states: "The jury should have been permitted to hear Batt take the Fifth Amendment and to evaluate her testimony on that basis." *Id.* Taken together, these statements suggest that Susan Batt could have been called to the stand, and could be called during a retrial, not so that testimony

could be adduced, but so that she could assert her Fifth Amendment right in the presence of the jury.

This suggestion runs counter to established precedent that precludes a witness from being called to the stand for the sole purpose of asserting a Fifth Amendment right in the presence of a jury. See, e.g., *State v. Kirk* (1995), 72 Ohio St.3d 564. In the instant case, it is clear at this junction that Susan Batt has a Fifth Amendment right to assert and that she would, in fact, assert that right if called upon to testify without a grant of immunity. It would be improper for her to be called to the stand for the sole purpose of asserting that right in the presence of a jury.

At the least, this Court should clarify the meaning of its statement. The statement that the "jury should have been permitted to hear Batt take the Fifth Amendment" appears to be nothing less than a misstatement of the law.

Conclusion

For any or all of the foregoing reasons, this Court should reconsider its decision of November 28, 2001.

The Court is urged to hold that Appellee/Cross-Appellant lacks standing to challenge either the assertion of a Fifth Amendment right by the State's witness or the grant of immunity by the trial court. Alternatively, this Court is urged to recognize the deference due to prosecutors' requests for immunity and the rebuttable presumption inherent in R.C. 2945.44. This Court should also apply the "abuse of discretion" standard to review the trial court's decision to grant immunity in this case. If any of this is done, the grant of immunity will be upheld.

At the very least, the Court should eschew adoption of a rule that immunity is not appropriate in "either/or" situations. The Court should also clarify (or repudiate) the suggestion in the majority opinion that a witness may be called to testify in a trial for the sole purpose of asserting a Fifth Amendment right in the presence of a jury.

Respectfully submitted,
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Certification

This is to certify that a copy of the foregoing was sent via ordinary U.S. Mail this 7th day of June, 2002, to Samuel Z. Kaplan, 835 Spitzer Building, 520 Madison Avenue Toledo, Ohio 43604; Fritz Byers, 824 Spitzer Building, 520 Madison Avenue, Toledo, Ohio 43604; Richard S. Walinski, Cooper and Walinski, 900 Adams Street, Toledo, Ohio 43624-1568; and Robert Z. Kaplan, 830 Spitzer Building, 520 Madison Avenue, Toledo, Ohio 43604, counsel for the appellee / cross-appellant.

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